Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	WT Docket No. 19-230
	)	
Verizon Petition for Declaratory Ruling	)	
Regarding Fees Charged by Clark County,	)	
Nevada for Small Wireless Facilities	)	

REPLY COMMENTS OF CLARK COUNTY, NEVADA

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I. INTRODUCTION

Clark County, Nevada (the "County") submits these Reply Comments to document the failings of both the Petition and comments filed in supportive of the Petition in this proceeding.[1] Commenters offer nothing specific to Clark County, nor its cost-based recurring pricing schedule. In fact, Commenters do little more than employ the illusory truth effect, i.e. the practice of repeating false claims in the hopes that the repetition will render the false information believable.

Clark County demonstrated in its Opposition, comprised of documentation and research, that its policies are consistent with applicable law, and that the County's fee regime is cost-based as required by Commission rules. When measured against this data-based defense constructed in detail by the County in its Opposition, Commenters offer nothing but misstatements of the facts and mischaracterizations of the Commission's rules. Neither the Petition, nor any supportive comments, provide any basis to grant the Petition's demands.[2] The Petition should be denied, and this proceeding should be terminated.

II. THE RECORD DOES NOT, BECAUSE IT CANNOT, REMEDY THE PETITION'S FATAL FLAWS.

As detailed throughout the County's Opposition, the Petition suffers from fatal flaws in both law and fact.[3] The comments submitted in support of the Petition merely repeat the same

[1] Unless otherwise specified, all references in this document to "Comments" of any party are presumed to refer to comments filed in WT Docket No. 19-230.

[2] The Commission should recognize, as well, that the "dispute" before it is effectively moot. No other provider offers any evidence of "effective prohibition" (and in some cases concede they are providing service in the County), and the County and Petitioner agreed to continue working under the terms of the existing Master License Agreement. That Agreement's terms are not before the Commission here, and the parties have agreed this matter should be held in abeyance.

[3] *See generally* Opposition of Clark County, WT Docket No. 19-230 (Sep. 25, 2019) ("Opposition").

errors. No evidence is introduced to support the claim that Clark County's fees are not cost-based. No evidence is proffered to show that the program is discriminatory. No provider details any services Petitioner is unable to provide. In fact, several commenters concede that they, too, provide covered services in the County.[4] A record showing that service is being provided cannot possibly support a claim of effective prohibition.[5] That is the record before the Commission here.

III. THE COMMISSION MUST RESIST THE ILLUSORY TRUTH EFFECT. CLARK COUNTY HAS ALREADY REFUTED THE ALLEGATIONS REPEATED THROUGHOUT THE COMMENTS.

Mere repetition of an inaccurate statement or conclusory assertion does not lend truth to the underlying matter, and the Commission must not be swayed by the "illusory truth effect"[6] of a chorus of voices all echoing the same misinformation.

The comments offered in support of the Petition merely echo the arguments outlined in the Petition that were refuted by the County in its Opposition. Likewise, commenters rely on facts already shown by the County to be, at best, incomplete. The sources most frequently cited by supportive commenters are not evidence offered by Petitioner,[7] nor in any case is additional

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[4] *See, e.g.* Comments of Crown Castle at 4 ("Crown Castle has existing network assets in Clark County, including 22 small cells and approximately 16 miles of fiber, and plans to install 6.3 miles of additional fiber within the County."); Comments of ExteNet at 4 ("ExteNet has numerous small cells (inclusive of nodes, radios, and antennae) deployed in Clark County *currently providing wireless service for different carriers*…") (emphasis added).

[5] *See* Comments of the City and County of San Francisco at 3-6.

[6] *See* Emily Dreyfuss, *Want to Make a Lie Seem True? Say It Again. And Again. And Again,* Wired.com (Feb. 11, 2017), https://www.wired.com/2017/02/dont-believe-lies-just-people-repeat/; *see also* Hasher, L., Goldstein, D., & Toppino, T. *Frequency and the conference of referential validity*. 16 Journal of Verbal Learning and Verbal Behavior 107-112 (1977), *available at* https://web.archive.org/web/20160515062305/http:/www.psych.utoronto.ca/users/hasher/PDF/Frequency%20and%20the%20conference%20Hasher%20et%20al%201977.pdf.

[7] The Competitive Carriers Association, for example, cited the Petition five times in its comments, and offered no other sources to substantiate the claims it makes. Mere repetition of a

evidence offered by any commenter; instead, the comments largely rely on the text of the Petition as evidence of their substantive claims. Simply repeating the claims Petitioner changes nothing about their accuracy, and the County has already refuted those claims with facts.

A. Commenters incorrectly argue that the County's fees are not cost-based, but offer no documentation or basis for their claims.

Numerous commenters insist, without offering explanation, insight or documentation, that the County's fees are not cost-based.[8] One simply repeats the Petitioner's claim that it "asked the county to provide cost-based support for these recurring fees" and that the County "failed to do so."[9] Another argues the County "has not demonstrated that any costs recovered by the fees are limited to the County's objectively reasonable costs."[10] A third argues there is "no evidence that the fee provisions reasonably approximate the County's actual and direct costs."[11] While a fourth offers that the County "has not provided any evidence of its costs" and that the history of the Ordinance suggests "that the fees were never intended to be cost-based."[12]

The County has already documented the inaccuracy of each these claims[13] and more importantly that is pricing sought only to recover its costs, or in some cases, less than its costs.[14] The Ordinance itself,[15] and the agenda items associated with its adoption,[16] demonstrate that the

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claim by a chorus of voices does not demonstrate the truth of the assertion. Yet T-Mobile cites the Petition as sole source for several of its claims, as do CTIA and Crown Castle.

[8] *See, e.g.* CTIA Comments at 7; T-Mobile Comments at 3; Crown Castle Comments at 5.

[9] CTIA Comments at 8.

[10] T-Mobile Comments at 8.

[11] Crown Castle Comments at 5.

[12] CCA Comments at 5.

[13] *See* Opposition at 14-18.

[14] *See id.* at 17.

[15] *See* Clark County Code Sec. 5.02.01(E).

[16] *See* Opposition Exhibit E.

intent of the County was only to recover costs. This was also documented in the Business Impact Statement prepared by the County in response to industry concerns.[17]

On December 18, 2019, the County directed its contractor, Smart Works Partners to present to the public and the Board of County Commissioners, a breakdown of the cost basis for the County's fee structure.[18] Petitioner[19], and most of the commenting parties[20], were represented at that public meeting, and spoke on the record. Yet Petitioner and T-Mobile now seek to employ the illusory truth effect by repeating for all to hear that "the County has not demonstrated that any costs recovered by the fees are limited to the County's objectively reasonable costs."[21]

The argument that the County's fees "were never intended to be cost-based" or that the County "has not provided any evidence of its costs"[22] is clearly rebutted by the record. Yet commenters persist, for they cannot turn untruth into reality absent repetition.

Despite attending the meetings where cost information was made public, commenters rely on a single piece of evidence that predates the Commission's Small Cell Order by almost a year. No commenter offers additional evidence; they merely cite this item, and rely upon it and

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[17] *See* Opposition Exhibit L.

[18] *See* Opposition Exhibit G, Transcript of December 18, 2018 Clark County Board of County Commissioners Meeting, Agenda Item 61, at 6-7 (describing the cost data presented to the Board and attached hereto as Exhibit D); see also Exhibit D, Cost Data Presented to the Board of County Commissioners on December 18, 2018. The presentation of this material to the Board and to the public may be viewed in the County's online recording of that Board meeting, available at the following web address starting from timestamp 1:51:40: https://clark.granicus.com/MediaPlayer.php?view_id=17&clip_id=6106&meta_id=1247578.

[19] *See* Opposition Exhibit G at 10-11 (remarks of Nick Magnone, Verizon Wireless Network Manager); *id.* at 11-12 (remarks of Danielle Agee, Verizon Wireless Market General Counsel).

[20] *See* Opposition Exhibit G at 12-14 (remarks of Rod Delarosa, T-Mobile Senior Site and Advocacy Manager).

[21] T-Mobile Comments at 8.

[22] CCA Comments at 5.

the repetition of the claim that the fees cannot possibly be cost-based. In fact, the fees are cost-based, and the County has documented this fact. Furthermore, Petitioner's only evidence to the contrary both predates any legal requirement that fees be cost-based, and reflects a proposal whose elements were not adopted. No commenter acknowledges these facts, nor does any admit the indisputable truth that cost information was both made available, and formed the basis for the County's fee schedule.

B. Other claims about the Ordinance and the County's actions in developing the Ordinance are inconsistent with the facts in the record.

Despite the focus of the Petition on fees, several commenters take the opportunity to raise collateral attacks on other aspects of the County's small cell permitting program. These claims are, without fail, unfounded.

At least one commenter claims that the County must have ignored industry feedback on its small cell program and ordinance.[23] But the County submitted with its Opposition a detailed list of changes made in direct response to industry requests.[24] The County also documented industry consultation meetings conducted throughout the development of the ordinance, and the receipt and consideration of comments submitted to the County by industry representatives.[25] That every industry preference was not reflected in the final ordinance is evidence only that the County's process includes, but is not beholden to, communications provider concerns.[26] There is no evidence supporting claims that industry input was ignored, nor any basis for Crown Castle to

[23] Crown Castle Comments at 5.

[24] *See* Opposition Exhibit C.

[25] *See* Opposition Exhibit A at ¶¶8-13.

[26] One commenter attempts to attack other aspects of the Ordinance not addressed by the Petition. Notwithstanding that these assertions are inaccurate, these issues are outside the scope of this proceeding and the Commission may give them no weight or consideration in this proceeding.

imply that the County is in some way obligated to revise its laws as Crown Castle or any other company sees fit.

Several commenters attack the County's policy of charging fees that vary between districts. No commenter acknowledges information presented to the public showing that the County's average fees, County-wide, fall in the middle of this fee range.[27] Nor does any provider acknowledge that higher fees are charged in areas where the County is making multi-million-dollar capital investments to streamline deployment and make conduit and smart poles more conveniently available for providers.[28] These elevated fees reflect this fact. And in other areas, the County's fees are lower than costs, as the County wishes to incentivize deployment areas the carriers are otherwise unwilling to prioritize. Notwithstanding the facts, however, the Commission granted localities discretion in how they calculate their costs.[29] Nowhere does the Commission require fees to reflect each individual site's individual costs, or that all costs across a jurisdiction be the same. They merely require that fees be a reasonable approximation of objectively reasonable costs, and that they be nondiscriminatory as between providers. The County has done this, and documented its actions; claims to the contrary are false.

Other commenters attack the County's compliance program, and specifically the annual inspections the County may conduct, and the fees it may assess to recover its costs in doing so. But no commenter acknowledges that the inspection fee and compliance program are the direct result of documented noncompliance with issued permits. County staff determined that in many instances, facilities actually constructed were not consistent with those proposed and approved

[27] *See* Opposition Exhibit D.

[28] *See* Opposition Exhibit F.

[29] *See* Small Cell Order ¶76.

by the County.[30] As a result of this noncompliance, the County determined that it was necessary, as part of managing the rights-of-way, to more proactively inspect permitted facilities to ensure compliance.[31] Consistent with Commission policy, these costs are passed on to providers. No commenter explains why they feel inspections are unnecessary, nor offers any evidence to demonstrate that the fees are not consistent with reasonable costs. Unfounded assertions of this nature deserve no consideration.

IV. THE RECORD REFLECTS WIDESPREAD MISUNDERSTANDING OF THE COMMISSION'S PRESUMPTIVELY REASONABLE FEE LEVELS.

Numerous commenters incorrectly assert that the Commission's presumptively reasonable fee limits serve as a litmus test for whether or not a fee is cost-based.[32] It appears these commenters believe that a fee is presumptively not cost-based when it exceeds these rates, but that is not what the Small Cell Order says.

The Small Cell Order specifies that when a fee is at or below the presumptively reasonable level it set, then such a fee is presumptively reasonable.[33] It does not state that a fee at or below the presumptively reasonable level is presumptively cost-based.[34] And the reason the Commission does not make that statement is that it could not make that statement based on the record before it in the Small Cell docket.

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[30] *See* Opposition Exhibit A ¶15 (noting that a County audit of 150 existing small wireless facilities found 90% out of compliance with master license agreements, and 50% out of compliance with their County permits).

[31] *Id.*

[32] *See, e.g.* Comments of ExteNet at 5; Comments of CTIA at 8; Comments of the Competitive Carriers Association at 6; Comments of T-Mobile at 8-9.

[33] Small Cell Order ¶78 ("…we conclude that fees at or below these amounts presumptively do not constitute an effective prohibition under Section 253(a) or Section 332(c)(7)…").

[34] *Id.*

The Commission conducted no study of actual costs of permitting. The sources cited as basis for safe harbor amounts themselves do not assert that the fee levels they impose are cost-based.[35] What Petitioner and commenters attempt in the instant matter is to force a logical leap where none exists. It does not follow that where a fee is not presumptively reasonable, it is also not presumptively cost-based. The Commission wisely avoided making such a statement, as it would be inherently arbitrary and capricious due to the total lack of research and data in the record to support any Commission finding of actual costs.

Nor is it relevant that the Commission opined, without basis, that it envisioned few situations where fees would exceed this level. No research or data are present in the record to support such a conclusion.[36]

Where a fee charged exceeds the presumptively reasonable fees established by the Small Cell Order, it is merely not presumptively reasonable, it is not presumptively higher than the recovery of costs. That the Commission, which did not conduct any analysis of actual real-world costs, did not imagine the safe harbor amount would frequently be exceeded, is entirely irrelevant. The Commission offers no basis upon which to base that belief, and the Commission's speculative pronouncement is neither determinative nor relevant.

In sum, the test is more complex than commenters or the Petitioner wishes it were. Where a fee is below the safe harbor amount, it does not matter whether or not it is cost-based – it is presumptively reasonable, but *not* presumptively cost-based. Where a fee exceeds the Commission's safe harbor amount, it is simply not presumptively reasonable – there is *no* attendant presumption that it is not cost-based. Nothing in the Small Cell Order suggests such a

[35] *Id.* n.233.

[36] *Id.*

conclusion. Industry commenters here seek to create such a conclusion by means of the illusory truth effect.

The complaining party – the Petitioner here – must make *some showing* that there is an effective prohibition. It is not enough simply to say "your fee is above the presumptively reasonable level, so it cannot be cost-based." There must be some evidence, some showing made, to support any claim under Section 253(a), before the burden shifts to the County to justify its position. The Small Cell Order does not purport to supplant the structure of the statute, and neither the Petitioner nor any commenter has made such a showing – they merely assert that, because the fee is outside the safe harbor, it must be a violation. This is a misstatement of the Commission's own interpretations, and should be rejected.

V. THE COMMISSION MUST REJECT COLLATERAL ATTACKS ON OTHER LOCALITIES AND DEMANDS FOR WHOLLY UNRELATED AND UNJUSTIFIED COMMISSION ACTION.

Several commenters urge prompt Commission action on the basis of general assertions of bad conduct by other municipalities, and the alleged need for additional Commission action to send a message to these communities. One commenter lists a number of communities by name,[37] and specifies actions it alleges are prohibitory, but offers neither evidence that that conduct effectively prohibits provision of service, nor that its assertions are accurate.[38] All these claims are outside the scope of this proceeding. For the Commission to act under Section 253, it must first be brought a specific complaint and provide notice and opportunity for comment.[39] While

[37] *See generally* Comments of ExteNet.

[38] It should be noted that ExteNet also seeks to confuse the record by referencing pricing levels and franchise fees that were negotiated prior to the Small Cell Order's effective date in numerous communities. But ExteNet fails to mention that many of those communities later offered fix rate alternatives to gross revenues based rents referenced in their filing, which in at least some cases providers declined to accept.

[39] *See* 47 U.S.C. §253(d).

these requirements have been met with respect to the County, they have not been met with respect to any other community in the nation. This proceeding is an improper venue for collateral attacks on other communities in the nation, and these arguments and claims by commenters should be wholly disregarded by the Commission.

The same is true with respect to demands, such as those made by ExteNet, for the Commission to revisit small cell rules barely a year old in order to give further advantages and benefits to wireless providers. In particular, ExteNet asks the Commission to impose the "deemed granted" remedy for alleged shot clock violations. Clark County strongly supports the response filed by the City of Baltimore, Maryland, describing the significant harm that will ensure if such an action is taken.[40] Furthermore, the Commission has before it no evidence suggesting that the 2018 Small Cell Order's updated remedy, which the Commission anticipated would lead to minimal litigation and prompt resolution of issues, is insufficient. That rule has been in effect less than a year, and no evidence is before the Commission that further action is needed. The Communications Act specifies a judicial remedy for violations of Section 332(c)(7), and the shot clocks are imposed pursuant to that section.[41] Providers' convenience is not protected by the Act – their ability to provide service is. There is no element of a "deemed granted" remedy which is necessary to preserve that ability, and the Commission must reject this and all other demands for imposition of such a remedy.

VI. CONCLUSION.

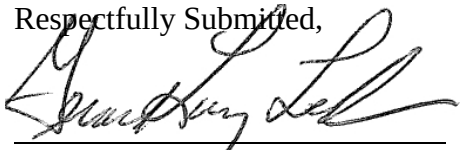
For the foregoing reasons, and for all the reasons described in detail in the County's Opposition, the Petition's requests should be denied. The County has documented that its fees are cost-based and that its program is structured to manage the County's rights-of-way in a

[40] *See* Reply Comments of the City of Baltimore (filed Oct. 8, 2019).

[41] *See* 47 U.S.C. §332(c)(7)(B)(V).

nondiscriminatory manner and consistent with federal law, and that the conclusory arguments offered by the Petition and its supporting commenters are in error. Clark County has invested significant resources in both working proactively to streamline permitting and deployment, and then revising those plans to adjust to new Commission rules, and should be held up by the Commission as an example of responsible local leadership; granting the Petition's requests will discourage other communities from being as proactive and forward-thinking as the County has been, leading to delays in wireless deployment rather than the acceleration the Commission desires.

Respectfully Submitted,



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